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No. 193

IN THE

SUPREME COURT

OF THE

United States

October Term 1955

JOHN LLOYD TAYLOR,
Defendant-Appellant,
vs.
UNITED STATES OF AMERICA,
Plaintiff-Appellee.

PETITION FOR WRIT OF CERTIORARI

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PETITION FOR WRIT OF CERTIORARI

To the Honorable Chief Justice, Earl Warren, and to the Honorable Associate Justices of the Supreme Court of the United States:

Your petitioner, JOHN LLOYD TAYLOR, respectfully petitions for a Writ of Certiorari directed to the United States Court of Appeal for the Sixth Circuit to hear and reverse a judgment for contempt for alleged failure to obey purported *Subpoena Duces Tecum.*

JURISDICTION

Jurisdiction is conferred by Title 28, U.S.C. at 1254 (1). The judgment of the Court of Appeal was filed May 3, 1955. A petition for rehearing was filed May 21, 1955, and, on modification of the opinion, was denied May 31, 1955.

STATUTES AND RULES OF CRIMINAL PROCEDURE INVOLVED

Title 18, Section 401, U. S. Code;

"Power of Court.

A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, as—

(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;

(2) Misbehavior of any of its officers in their official transactions;

(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command, June 25, 1948, c. 645, 62 Stat. 701.

Title 18, Section 3691;

"Jury Trial of Criminal Contempts.

Whenever a contempt charge shall consist in willful disobedience of any lawful writ, process, order, rule, decree, or command of any district court of the United States by doing or omitting any act or thing in violation thereof, and the act or thing done or omitted also constitutes a criminal offense under any Act of Congress, or under the laws of any state in which it was done or omitted, the accused, upon demand therefor, shall be entitled to trial by a jury, which shall conform as near as may be to the practice in other criminal cases.

This section shall not apply to contempts committed in the presence of the court, or so near thereto as to obstruct the administration of justice, nor to contempts committed in disobedience of any lawful writ, process, order, rule, decree, or command entered in any suit or action brought or prosecuted in the name of, or on behalf of, the United States. June 25, 1948, c. 645, 62 Stat. 844."

RULES OF CRIMINAL PROCEDURE

Rule 17,

"Subpoena.

For Attendance of Witnesses; Form, Issuance. A subpoena shall be issued by the clerk under the seal of the court. It shall state the name of the court and the title, if any, of the proceeding, and shall command each person to whom it is directed to attend and give testimony at the time and place specified therein. The clerk shall issue a subpoena, signed and sealed but otherwise in blank to a party requesting it, who shall fill in the blanks before it is served. A subpoena shall be issued by a commissioner in a proceeding before him, but it need not be under the seal of the court."

(b) . . .

(c) *For Production of Documentary Evidence and of Objects.*

A subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated thereon. The court on motion made promptly may quash or

modify the subpoena if compliance would be unreasonable or oppressive. The court may direct that books, papers, documents or objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit the books, papers, documents or objects or portions thereof to be inspected by the parties and their attorneys.

(d) *Service.*

A subpoena may be served by the marshal, by his deputy or by any other person who is not a party and who is not less than 18 years of age. Service of a subpoena shall be made by delivering a copy thereof to the person named and by tendering to him the fee for 1 day's attendance and the mileage allowed by law.

(f) . . .

(g) *Contempt.* Failure by any person without adequate excuse to obey a subpoena served upon him may be deemed a contempt of the court from which the subpoena issued or of the court for the district in which it issued if it was issued by a commissioner. As amended Dec. 27, 1948, effective Oct. 20, 1949.

QUESTIONS PRESENTED

(1) Whether a purported *Subpoena Duces Tecum* issued without an order of the court or judge to appear before a Grand Jury is a valid *subpoena duces tecum;*

(2) Whether the Grand Jury has any authority under the Rules of Criminal Procedure for the District Courts of the United States to issue or require obedience to a *subpoena duces tecum;*

(3) Whether a witness is, or can be, in contempt of Court prior to the Court itself making any valid order requiring the appearance of the witness with his books, papers, records and documents;

(4) Whether a motion to quash a purported *Subpoena Duces Tecum* automatically stays the proceedings requiring him to appear and produce his documents until the time that the court rules on the motion, and thereafter, fixes a date within which compliance is required.

(5) Whether the failure to comply with a *Subpoena Duces Tecum,* if valid, entitles the witness to a trial by jury on the question of whether his conduct was wilful, intentional and deliberate, and therefore "criminal."

(6) Whether the defendant was entitled to a trial by jury on the questions of fact raised in the criminal prosecution under the Sixth and Seventh Amendments to the Federal Constitution.

(7) Whether the failure to tender the witness the fee for one day's attendance and the mileage allowed by law at the time of the service in the subpoena invalidates or makes void the purported service of the subpoena.

(8) Whether the same Judge who, on the hearing on motion to quash the subpoena, stated that if the Government made a presentment to the court asking that John Lloyd Taylor be cited for contempt of court he would order the arrest of the defendant and ask that he be brought before him, and the hearing set on why he shouldn't be cited for contempt, had an interest in the proceedings and was thereafter disqualified to hear and sentence the petitioner as a denial of due process of law guaranteed by the Fifth Amendment to the Constitution of the United States.

STATEMENT OF FACTS

On August 6, 1953, a document entitled "Subpoena to Testify Before Grand Jury" addressed to John Lloyd Taylor (Jeff Taylor), President of Professional Screen Guild, Inc., 6605 Hollywood Blvd., Los Angeles, California, was signed by Frank J. Dingell, Clerk, by Raymond W. Bilton, Deputy Clerk, for the United States District Court for the Eastern District of Michigan. (R. 2A). The document ordered him to appear August 13, 1953, at 10:00 o'clock A. M. " to testify before the Grand Jury", and to bring: all records and books covering the operation of the Detroit, Michigan office of

the Professional Screen Guild, 1008 Fox Building, 2211 Woodward Avenue, and 1070 Penobscot Building, Detroit, Michigan, including names and addresses of all officers and employees with salaries and commissions paid; names and addresses of all persons who entered into a contract for membership of the Professional Screen Guild, and/or for publication of the persons enrolled in the official Screen Directory of the Porfessional Screen Guild; Recordings, if any, of interviews had with prospective members or their parents; original contracts of all persons who entered into a contract through the Detroit office of the Professional Guild, Inc.; all records covering modeling, television, radio, motion pictures, or other similar employment; records showing publication and distribution of official Screen directory of the Professional Screen Guild; original directives or other papers furnished interviewers, and/or persons engaged in contacting prospective members by telephone, records showing membership in Professional Screen Guild, Inc. by Bing Crosby, Bob Hope, Roddy McDowell, Elizabeth Taylor, Dean Stockwell and Margaret O'Brien. Also all records and correspondence and contracts exchanged between Lee F. Redman, Jr. doing business as Saxony Studios, 8344 Grand River Avenue, Detroit, Michigan." (R. 2A, 3A).

The document was served upon Mr. Taylor on August 11, 1953, (R. 63A) at Los Angeles, California. No money was either tendered or paid to him. A postoffice inspector then purportedly telephoned a teletype message to a U. S. Assistant District Attorney

in Detroit. The telephone call was a supposed extention of time to appear on the 18th of August at 10:00 o'clock A. M. (R. 64A). Taylor consulted an attorney in Los Angeles and was advised that he should make a motion to quash the subpoena (R. 65A). The motion to quash the subpoena was filed on August 18, 1953 (R. 4-A).

The motion set out that the subpoena was served 2600 miles from the place of appearance; that no witness fees were tendered; that the subpoena is unreasonable and oppressive; that the records and books which were required under the subpoena would "practically require a van or truck to deliver the same." That the witness is without funds to pay his own cost of transportation, and subsistance while away from his place of residence; that the issuance and attempted service was and is in violation of the Fourth Amendment to the Constitution of the United States, and that his appearance in Detroit would endanger his life and subject him to reprisals by certain persons who have made threats against him, and were trying to get him to Detroit to serve him with civil process, and the Movant, appearing specially, moved to quash this subpoena. The document was dated August 17, 1953, (R. 6A) a day before the telephonic extended time. The motion is accompanied by an affidavit (R. 7A); the affidavit sets out that the subpoena was issue for August 13, at 10:00 o'clock A.M., whereas he was not served until August 11th; that it did not permit traveling time of 2600 miles, and that it calls for records without specifically stating

what particular records wanted; that even if specifically described it would be impossible because of the time element to gather the same; that it would require practically a truck to bring them in; that the Professional Screen Guild has been operating for many years; that no witness fees or mileage, or train or plane fare was tendered to the witness at the time of being subpoened; that the *subpoena duces tecum* is oppressive; that it is a "fishing expedition", and that it is in direct violation of the Fourth Amendment to the Constitution of the United States; that it was an effort to bring the witness into the jurisdiction of Detroit so that he could be served with civil process, or doing bodily injury or to compel him to become a member of the Better Business Bureau at an exorbitant membership fee.

It further sets out that the subpoena was illegally issued, and therefore, null and void since the rules do not provide any authority for the Grand Jury to issue a subpoena. An answer to the motion to quash was filed on August 21, 1953 (R. 12A). In answer to the first three paragraphs of the petition's motion, the Government denied the same. In answer to paragraphs 4 to 8, the Government neither admitted nor denied the same for want of Knowledge thereof, and left the petitioner to his proofs (R. 12A, 13A).

The Government in its answer to the motion to quash the *Subpoena Duces Tecum* filed affidavits of Post Office Inspector A. E. French, assigned at Los

Angeles. In his affidavit Mr. French said that on August 11, 1953, together with Deputy United States Marshal, Richard Ransdall, he went to the office of the Professional Screen Guild at 6605 Hollywood Blvd., Los Angeles, for the purpose of identifying John Lloyd Taylor (Jeff Taylor) in order that a subpoena might be served on him for his appearance before a Federal Grand Jury at Detroit on August 13th. After relating some conversation with Taylor Mr. Taylor asked if his appearance requiring at Detroit could be extended to August 18th, 1953, whereupon, he said he telephoned Detroit at a phone from his office and he had a teletype message directed to Inspector E. A. Barnhart in Detroit, and received an immediate reply. Inspector Barnhart said he had talked to the Assistant United States Attorney handling the case, and that it would be O. K. for Taylor to appear in Detroit on August 18, at 10:00 A. M.

Mr. Taylor, according to the affidavit, on being served with the subpoena, said he would have to have an advance of transportation costs. The Inspector said that he again teletyped Barnhart (R. 15A, 16A) and told Mr. Taylor "that he would be advanced transportation costs in advance by the U. S. Marshal if he would appear at the Marshal's office to pick up the required amount of funds." It appears funds, however, were not tendered to Mr. Taylor at the time of the service of the subpoena. Mr. French also said that Mr. George Rossini Deputy U. S. Marshal, telephoned to the Inspector that he had telephoned Mr. Taylor

telling him that the Marshal's office had received authorization from the United States Attorney at Detroit to advance the transportation expenses to Taylor, and that Mr. Taylor had told him that he would come in to the Marshal's office the following morning at 11:00 A. M. to pick up the money. (R. 17A).

Chief Deputy U. S. Marshal Raymond Ransdell informed the Inspector he said in his affidavit on August 18 that Mr. Taylor had never appeared to claim his transportation money. (R. 17A).

A motion to quash the *subpoena duces tecum* was filed August 18, 1953, (R. 4A), and the response was filed on August 21, 1953. (R. 12A). The Court set the hearing on the matter for August 24, 1953. (R 26A).

In the hearing the Judge expressed his views toward the defendant as to certain parts of the defendant's affidavit regarding the Better Business Bureau, and said (R. 32A) "It is an apparent attempt on his part in the hope that this would be publicized, that the information would come to the Grand Jury, and that they would be impressed with his allegation that this is a prosecution and investigation being controlled by the Better Business Bureau, and the Better Business Bureau of the City of Detroit has no more to do with the Grand Jury functions of this District than anyone else in Detroit that is separated from the Government service, and I think you know that." (R. 32A, 33A). The Court then commented on his experience in the United States Attorney's office. This is apparently

prior to getting on the bench (R. 33A). Comments. His opinion in the defendant's affidavit is "insulting, scandalous and contemptuous." (R. 34A).

The Judge further commented that "as I read it, and I know nothing about the investigation other than what I have read in the newspapers; that this Professional Screen Guild has been under some sort of investigation." (R. 34A). The Court said he thought the position of the movement was "completely without merit in my opinion." (R. 34A). The Judge then said, "I will deny your motion" — The Government counsel said, "Mr. Wood, we wish that the court would deny the motion in all of its grounds and aspects." (R. 35A). The Government said: "The Government will ask at this time, and will prepare an Order if your Honor sees fit, that compliance be made in full with the original *subpoena dues tecum* in this cause to produce these books and records within one week from today." (R. 35A).

No order was ever made, and no date was set. Instead the Court said: "I will deny your Motion to Quash, and if the government sees fit to present an Order asking for compliance, or if the Government and the Grand Jury sees fit to make a Presentment to the Court asking that the Witness, John Lloyd Taylor, be cited for contempt of court for not complying with the provisions of the *Subpoena duces tecum,* I will entertain such a Presentment; and, if a presentment of that description is made, then I will order the arrest of the defendant and ask that he be brought here in the

custody of the United States Marshal and a hearing date set on why he shouldn't be cited for contempt of Court."

"So, whatever method the Government wants to pursue is agreeable with the Court; the order of compliance or a Presentment from the Grand Jury, if the Grand Jury sees fit to make the Presentment; because I am convinced Mr. John Lloyd Taylor is going to try and conduct this matter in his own way and I don't think he should be permitted to do it." (R. 35A). Thereafter, no order was made fixing any specific date for the defendant to appear, but a petition for Rule to Show Cause was filed. (R. 19A).

The petition for a rule to show cause went to the same Judge who thus expressed himself setting out that on August 6, 1953, "a subpoena was issued by the Clerk of said court requiring John Lloyd Taylor to appear and bring with him to Room 829 in the Federal Building, Detroit, Michigan, on the 13th day of August, 1953, at 10:00 A.M. all record, books, etc. covering the operation of the Detroit, Michigan office of the Professional Screen Guild, 1008 Fox Building, 2211 Woodward Ave., and 1070 Penobscot Building, Detroit, Michigan." (R. 19, R. 20), sets out that the *subpoena duces tecum* was served on August 11, 1953, at Los Angeles, and it further sets out that "he was informed that the necessary fees would be advanced to him, and made available for him to comply with the said subpoena." "And an extension of time was granted to August 18, 1953; "that on the 18th of

August John Lloyd Taylor was in attendance upon or obedient to the Grand Jury *subpoena duces tecum;* It was thereupon prayed that "an Order of Attachment be issued for John Lloyd Taylor, a/k/a John Lloyd Taylor, a/k/a Jeff Taylor, and that he may be arrested and brought before this Court to be tried and upon conviction punished for his criminal contempt in failing to comply with the Grand Jury *Subpoena duces tecum* as hereinbefore described." (R. 21A). A bail of $10,000 was fixed upon this attachment, and the defendant was brought before the same Judge who had suggested to the United States Attorney that instead of a new date being fixed that they gave him a presentment that they would order the arrest of the defendant, and set a hearing on why he shouldn't be cited for contempt of court. (R. 36A).

The hearing and proceedings to cut bail took place on September 16, 1953. (R. 36A) the court declining to cut the bond (R. 36A, R 38A) from $10,000 (R. 38A). The court on this hearing to cut the bond stressed some view regarding the petitioner (R. 37A) and declared that "I understand he does have a background of law, and that he has a law school education, and information has come to the court, whether true or false, that he prepared the petition in support of the motion to quash the subpoena which I held to be scandalous and contumacious." (R. 37A). On September 25, 1953, the court held a hearing before himself *"re contempt"* (R. 39A). A motion to dismiss was denied. A motion to dismiss on the basis that it fails to inform the defendant of a violation of

a particular statute was denied. (R. 40A). The Judge said he was proceeding under Title 18 Section 401.

Frank Paone, Foreman of the Grand Jury, in August 1953, said he authorized the issuance of a subpoena, Exhibit "1" (R. 44A) for the 13th of August, 1953, and that they were not produced either on August 13, or August 18th, 1953, and that Mr. Taylor did not appear (R. 44A, 45A). Richard M. Ransdell testified that he is a Deputy Marshal in Los Angeles, and that he received the subpoena on August 11, and had it between 1:00 o'clock to 4:00 o'clock on that date. He saw Mr. Taylor at 6605 Hollywood Blvd. in Los Angeles, California, (R. 52A) and told him he was a Deputy Marshal and handed him the subpoena. And he heard Mr. Taylor say that the subpoena did not give him enough time to go to Detroit and get the records ready. Mr. French asked if an extension of time was granted would meet with his approval and he said it would, and he heard Mr. French telephone (R. 53A, 54A) and advised him that it was continued to August 18, 1953. Mr. Taylor also told him that he did not have the funds to go with, and Mr. Ransdell told him that he would come to his office at any time that was convenient for him that his office would furnish the funds, and that he stated he would. (R. 54A). On redirect examination, the Marshal asked if he had tendered him the fees and mileage at the time of serving the subpoena:

> "The Court: He has already testified he didn't.
> Mr. Baxter: He did not do it.
> Mr. Woods: All right, that is all."

The petitioner testified that he lived at 8065 Willow Glen Road, Los Angeles 28, California, and has lived there for approximately six years. (R. 63A). He testified that the Government's Exhibit "1" was served upon him on the 11th day of August. Original was not shown to him at that time and a gentleman from Los Angeles was the one that handed it to him, and he was granted an extension of time. (R. 63A). No money was ever paid to him; he asked for it and they told him they would have to call and get authority on it. (R.64A). They told him that he could call the Marshal's office to find out. They told him to appear in Detroit on the 18th day of August, at 10:00 o'clock. He apeared on that day through counsel on the advice of counsel. R. 64A). He showed copy of his *subpoena duces tecum* to an attorney practicing law in the State of California, who has been a lawyer for almost ten years. (R.65A). His lawyer told him that he should appear through counsel in the form of a motion in order to quash the subpoena. (R.65A). He testified that he was told that he did not have to appear at that time, that the motion would be sufficient. He was never told later by anyone to appear. If he had been asked to appear he would have appeared. On cross-examination he testified that the motion to quash was handled by Mr. Cohn. (R.67A) Mr. Cohn did not advise him to be in Detroit personally. Mr. Cohn did not communicate with him after the motion to quash was heard. (R. 67A, R. 68A). He did not know the motion to quash was denied until Labor Day. He went to Mexico on his anniversary; his anniversary was on the 23rd of Aug-

ust. He went down to Ensenada with his wife, which is about 150 miles, from San Diego it is about 60 miles, on the afternoon of August 22nd, and arrived back in Los Angeles about 7 o'clock on Labor Day evening. He knew at that time there was a warrant out for him for criminal contempt, that is why he came back to Los Angeles in a hurry. He found out about it at 2 o'clock in the afternoon of Labor Day when his wife brought him the news. (R.68A). His wife said she had communicated with attorneys in Detroit and knew that. She advised the attorneys that he would surrender the day after Labor Day. (R.69A). He went to counsel, and counsel advised him to come to Detroit himself. He did not promise to surrender on the day after Labor Day, nor to anyone in California. On advice of counsel he came to Detroit to surrender (R.69A). He left Los Angeles on the evening of Labor Day; he got to Detroit the folowing Monday or Tuesday, about six days later. He did not, on August 11th, have access to the books and records of all the books and records of the Professional Screen Guild. He did not have any of the records that was asked for and that is the reason he went to counsel. His official capacity in the Professional Screen Guild is that of General Manager. The Articles of Incorporation gave him as President but he doesn't know. (R.70A). He was past President and has been President for some time; is listed in the Articles of Incorporation filed in the State of Michigan as President, doesn't know whether he is still President; has not filed any Amendments or changes to the corporate status, and the officers were

of the State of Michigan. (R.71A). Says does not know whether he is still President. He has not personally filed any amendments or changes, the attorneys have been requested to. (R.71A). That he has not as of September 25, 1953, ever appeared at Room 829, Federal Building, Detroit, Michigan, and brought to that office at that address the books and records as requested in the subpoena with which you were served on August 11, 1953. The motion in his affidavit to quash the subpoena was made 100% in good faith upon the advice of counsel. (R.74A).

The Judge then undertook the questioning of the defendant directly. He asked him his educational background, and he said he was a valedictorian of his class and editor of his annual year book. He went to the University of West Virginia as an Honor student. He said he was 45 years old, and that he studied law privately under Dean Konop of the University of Notre Dame. (R.76A). He read other legal books (R.77A). Was associated with an attorney in California named Martin Korstad, K-o-r-s-t-a-d, who is an attorney. (R.78A). He was a collection attorney and the witness acted as his investigator. (R. 78A). From time to time he read passages and discussed law with him. The entire questioning from Pages 75 of the record to page 97A, which constituted the cross-examination after Government counsel had examined, the defendant briefly from page 72A to 74A, a matter of two pages, should be from 66A to 74A, a matter of six pages, thereafter conducted by the Trial Judge himself going from 75A

to 97A. This questioning by the Judge involved an intense interrogation regarding the petitioner's right, where he was on his vacation, how he got to Detroit, what his contacts were with his attorneys, and facts and circumstances surrounding his finding of the affidavit and the information contained therein; and how he got to Detroit. The witness testified on re-direct examination he took a plane from Los Angeles on September 7, 1953, and the course of his trip in arriving to Detroit.

The Court wanted to know how it was that the witness informed the United States Marshal he was without travel funds when he was preparing for a vacation, which the witness said cost him less than $60.00. (Rep. Trans. 100A.) Counsel for the defendant then asked that the motion praying that the Court find the defendant in contempt be denied, and the fact that the defendant had proved beyond a doubt that whatever he did and whatever acts he performed were performed in good faith, without malice, without intention to deceive, and under advice of counsel. The Court denied the motion (R. 103A). Defense counsel then further contended that defendant did not have to a thing, and the Judge never signed one order "until the day before yesterday, when I failed to find an Order in the file; then, after 12 o'clock, the day before yesterday, in the afternoon, the 23rd of September, you signed an Order as of the 23rd, but you didn't date it *Nunc pro tunc*. You dated it on the 23rd, so it is my feeling and it is my belief, and I have so informed the defendant,

that he has not been in contempt, in that he has been before this court; that he couldn't appeal from any action of this court."

Defendant's counsel also pointed out that he has ten days to file a motion for a new trial or re-hearing, (R. 103A.) At that time he can ask for an additional ten days. It is the contention of defense counsel, he has until the 3rd day of October, even, to ask for a re-hearing upon the Order sign by the Judge this very afternoon. (Rep. Trans. 104.) The Court then made a series of oral findings (R. 104A) in which he found the defendant guilty of criminal contempt. (R. 107A). The Judge found him not only in contempt, but said the aggravation of the contempt was the fact that two days before a hearing was to be had on his Motion to Quash the *Subpoena Duces Tecum* he went to Mexico and no one in California knew his whereabout, and if the Motion to Quash had been filed in good faith and had been determined against him, he was hiding in Mexico and that to him was an aggravation of the contempt. (R. 110A). The judge then sentenced the defendant to the custody of the Attorney General for imprisonment for a term of five months. (R. 112A).

REASONS FOR GRANTING THE WRIT

I.

This case involves an important question of the law of criminal contempt which has not been, but should be, determined by this Honorable Court. It also involves important questions of the supervisory jurisdiction in connection with the law of criminal contempt, revolving around the issuance of a *subpoena duces tecum.*

(1) The purported *subpoena duces tecum* was not an order of the court: The document, although headed "Subpoena to Testify Before Grand Jury, UNITED STATES DISTRICT COURT For The EASTERN DISTRICT OF MICHIGAN (R. 2a), and directed to "John Lloyd Taylor (Jeff Taylor)" was not signed or directed by any judge, nor based upon any order made by any judge. (R. 3a.) It was solely issued by the Clerk of the Court. The Clerk of the Court has no jurisdiction to make an order for the disobedience of which a person may be brought into court for contempt. Not until the judge made an order could the defendant be held to violate an order of court. It is only the *order of the court* which has the force of law for the disobedience of which one may be held in contempt.

The form of the subpoena used in this case did not bear any order or signature of any judge; it contained no direction of any judge; no judge, in fact, gave any such direction at any time. The district judge before

whom the matter came later preferred to order imprisonment than to get the documents referred to.

In Housel and Walser, 2d Edition, under the title "Defending and Prosecuting Federal Criminal Case, form 101, page 1128, contains a form of grand jury *subpoena duces tecum*. It is in the name of the President of the United States and directed to a person "Greeting", and it commands the person who is being served with the subpoena to appear and attend before the grand inquest of the body of the people of the United States of America, at a certain time and place, "to testify and give evidence in regard to an alleged violation of, etc." and that you produce at the time and place aforesaid the following" (with places left to specify the documents desired.) It also contains, "and for failure to attend and procure the said documents you will be deemed guilty of contempt of court and liable to the penalties of the law." Witness The Honorable_____Judge of the District Court of the United States for_____District_____ in the City of_____on the_____day of_____ in the year of our Lord 1940_____."

Such a form of subpoena contains an order of a judge and who has ordered the subpoena, if the judge did so order, and also contains notice to the accused that for failure to attend and procure the said documents, he will be deemed guilty of contempt of court and liable to the penalties of the law.

The document served upon the petitioner contained no direction of the judge, and no notice of the possible penalty for failure to comply.

The court seems to have recognized during the proceedings that the court must issue or make an order in connection with Grand Jury subpoenas. As a matter of fact, the rules of criminal procedure for the District Courts of the United States do not contain any provisions for the issuance of a subpoena by or on behalf of the Grand Jury. (See Rule 17, Rules of Criminal Procedure for the District Court of the United States.)

In all administrative matters Congress has not yet left the authority to determine whether one is guilty of contempt to an administrative body; not even Congress has taken that power upon itself. All of those matters must be submitted to a judge, who must first make a lawful order. Where there are two kinds of contempt, civil and criminal, the court first has the duty of fixing an order for the person to obey and then if he does not obey the order he may be imprisoned until he obeys the order. Thus he carries "the keys of the prison in his own pockets." (*In re Nevitt*, (C.C.A. 8th) 117 Fed. 478, 461.)

But, until an order of court is actually made, there is no disobedience of a purported subpoena issued by a Clerk, which contains no judge's order and was not seen or heard by the judge until after the date specified in the purported subpoena.

And, here, no order of court was ever made until September 23, 1953—long after the date mentioned in the document purporting to be a subpoena,—and the judge chose rather to imprison the defendant than to order the production of the documents, or to give him

a date when he might produce the documents which it was claimed that the Grand Jury wished to see.

Here there was no order of court which the defendant ever disobeyed, no valid subpoena was ever issued with a direction by the judge to obey it, and no date was ever fixed by the judge until more than a month after the date of the purported subpoena.

In *Lopiparo v. United States,* 216 Fed. 2d 87, certiorari denied 348 U. S. 916, the appellant in that case was before the court and the court directed him to have the books before the Grand Jury at 10:00 o'clock on May 20th, without fail. (216 Fed. 2d 88). Thereafter he gave the petitioner a further chance to comply to produce the journal and ledger before the Grand Jury. Contempt proceedings followed upon his disobedience of a specific order of the court made in open court in his presence. No such proceeding took place here. It is important that this Court grant certiorari to determine the validity or invalidity of such a document as was served upon the appellant and to determine whether it constitutes a valid Grand Jury subpoena. Also, whether an extension of time by teletype between the Postoffice Inspector and a deputy United States Attorney (which thereby implicitly recognized that the time on the document was too short) constituted such a change in the document without the authority of the Clerk or the person supposedly issuing the subpoena as to invalidate it in any event. This presents an important question of criminal law and procedure in the matter of the issuance of *Subpoenas Duces Tecum* and

whether there is any authority for a subpoena by the Grand Jury to appear before it.

The authority for such a subpoena must come from Congress or other rule making authority, or other proper authority; they cannot be created where no such authority or direction exists. This is a hiatus in the law. It is for Congress to correct.

II.

A second reason why the writ should issue: The subpoena is criminal in its nature and therefore an attempt to vindicate the dignity of the court.

United States v. United Mine Workers, 330 U. S. 258;
Gompers v. Buck's Stove & Range Co., 221 U. S. 418.

But, before it could be criminal in its nature, there had to be a judge's order which was specific and which judge's order was disobeyed. The purpose of criminal contempt is to vindicate the dignity of the court and to vindicate the public interest.

Gompers v. Buck's Stove & Range Co., 221 U. S. 418;
Nye v. United States, 313 U. S. 33, 42;
Re Bradley, 318 U. S. 50, 87 L. Ed. 608.

In *Penfield Company v. Securities & Exchange Comm.,* 330 U. S. 604, it is stated:

"Congress has never attempted, however, to confer upon an administrative agency itself the power

to compel obedience to such a subpoena. It is beside the point to consider whether Congress was deterred by constitutional difficulties. That Congress should so consistently have withheld powers of testimonial compulsion from administrative agencies discloses a policy that speaks with impressive significance.

Instead of authorizing agencies to enforce their subpoenas, Congress has required them to resort to the courts for enforcement. In the discharge of that duty courts act as courts and not as administrative adjuncts. The power of Congress to impose on courts the duty of enforcing obedience to an administrative subpoena was sustained precisely because courts were not to be *automata* carrying out the wishes of the administrative. They were discharging judicial power with all the implications of the judicial function in our constitutional scheme."

What was there said, we believe, is clearly applicable to purported subpoenas issued by the Clerk of a Court, or requests by Grand Juries. He is merely an administrative agent. The Grand Jury, likewise, has no power under the law as it presently exists to issue any subpoena. Until a court makes an order, there has been no judicial command for disobedience of which one may be arbitrarily and capriciously punished and sent to the penitentiary for five months.

Even though the petitioner might have regarded the document served upon him as valid, it was on its face void, not having been a lawful order of a court, and as such the petitioner had a right to ignore it.

In re Sawyer, 124 U. S. 200, 31 L. Ed. 402;
Ex parte Fisk, 113 U. S. 713, 28 L. Ed. 1117;
Ex parte Rowland, 104 U. S. 604, 26 L. Ed. 861.

III.

THE RULE TO SHOW CAUSE WHY THE PETITIONER SHOULD NOT BE PUNISHED FOR CRIMINAL CONTEMPT (R. 19a) FAILS TO CHARGE THE PETITIONER WITH WILLFUL VIOLATION OF ANY STATUTE OF THE UNITED STATES AND FAILS TO CHARGE A WILLFUL DISOBEDIENCE OF ANY STATUTE OR VIOLATION OF ANY STATUTE, AND FAILS TO CHARGE A CRIMINAL OFFENSE. THE RULE TO SHOW CAUSE, THEREFORE, DOES NOT COMPLY WITH RULE 42(b) RULES OF CRIMINAL PROCEDURE OR WITH THE FIFTH AND SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

The document shows on its face that "a subpoena" was issued by the Clerk and not by any judge. The subpoena shows on its face that no judge made any order in respect to this petitioner and that the document therefore purporting to be a Grand Jury *subpoena duces tecum* was utterly void and without any order of court directing its performance or for the disobedience of which the dignity of the court was to be vindicated. The document also showed that it was served on the petitioner only two days before the date set out in the subpoena. It further showed that no witness fees were tendered at the time of the service

of the subpoena as required by Rule 17, Rules of Criminal Procedure for the District Courts of the United States; that the petitioner "was informed that the necessary fees would be advanced to him and made available for him to comply with said subpoena," which was not a compliance with the rule. The document fails to show who, or on what authority any extension or change of time was granted or the authority of the person to change the time of the purported document. Therefore, the subpoena fails to charge a criminal contempt in violation of any statute of the United States.

The United States Attorney stated that "This, your Honor, is a criminal contempt proceeding on petition filed by the United States Attorney, with affidavits until Section 401, Title 18." (R. 40a). Title 18, Section 401 provides:

> "A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—
> (3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command."

We find nowhere any *lawful writ, process, order, rule, decree, or command* of the court to this petitioner.

IV.

THE PURPORTED SUBPOENA WAS VOID FOR FAILING TO GIVE NOTICE TO THE PERSON SERVED THAT IF HE FAILED TO OBEY HE WOULD BE DEEMED GUILTY OF CONTEMPT OF COURT AND LIABLE TO THE PENALTIES OF THE LAW, AND THUS FAILED TO COMPLY WITH THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES, AND HAS FAILED TO GIVE DUE NOTICE OF THE CONSEQUENCES OF FAILURE TO OBEY THE DOCUMENT, IF OBEDIENCE WAS REQUIRED.

"Notice" is one of the fundamentals of law; and, notice of the consequences of not complying with a subpoena is the right of every citizen. The form set out by Housel and Walser, on page 1128 of their valuable book "Defending and Prosecuting Federal Criminal Cases (2nd Edition)", form 101, contains such a notice. But, the document served upon the petitioner did not contain such a notice. This is an important quetion of constitutional law which has not been passed upon, but should be, by this Honorable Court.

Smith v. O'Grady, 312 U. S. 329;
Twining v. New Jersey, 211 U. S. 78;
Morgan v. United States, 298 U. S. 468, 304 U. S. 1;
Ohio Bell Telephone Co. v. Public Utilities Commission, 31 U. S. 292, 304.

V.

THE DISTRICT COURT ERRED IN HOLDING THAT THE PETITIONER COULD BE HELD IN CONTEMPT WHEN HE HAD MADE A SEASONABLE MOTION TO QUASH OR MODIFY THE SUBPOENA DUCES TECUM ON THE GROUNDS THAT COMPLIANCE WOULD BE UNREASONABLE OR OPPRESSIVE, AND THE COURT THEREAFTER ARBITRARILY FOUND HIM IN CONTEMPT WITHOUT SETTING A DATE FOR HIM TO COMPLY AND WITHOUT MAKING ANY FURTHER ORDER THEREON.

This case involves an important procedural question. Rule 17 (c) of the Rules of Criminal Procedure for the District Courts of the United States provides:

> "A subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated therein. The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive." . . .

The purported subpoena was served upon the appellant on August 11th, 1953. One week later, to-wit, August 18, 1953, a motion was made to quash or modify the subpoena on the grounds that his compliance would be unreasonable or oppressive. The purported subpoena required the production of books and records covering the operation of the Detroit, Michigan office; it required the names and addresses of all persons who en-

tered into a contract for membership in the Professional Screen Guild and/or for publication of the persons enrolled in the official Screen Directory; recordings, if any, of interviews had with prospective members or their parents; original contracts of all persons who entered into a contract through the Detroit office; all records covering modeling, television, radio, motion pictures, or other similar employment; records showing publication and distribution of the official Screen Directory of the Professional Screen Guild; original directives or other papers furnished interviewers, and/or persons engaged in contacting prospective members by telephone; records showing membership in Professional Screen Guild, Inc., by Bing Crosby, Bob Hope, Roddy McDowell, Elizabeth Taylor, Dean Stockwell and Margaret O'Brien also all records and correspondence or contracts exchanged with Lee F. Redman, Jr., doing business as Saxony Studios, 8344 Grand River Avenue, Detroit, Michigan. (R. 2a, 3a).

The petitioner, in his Motion to Quash has set out: "That the records and books of the Professional Screen Guild, Inc., would practically require a van or truck to deliver the same," (R. 5a), and "That the subpoena is unreasonable and oppressive," (R. 5a), "That the said books and records are situated in various cities of the United States", that the subpoena does not describe them in particular; that it violates the Fourth Amendment. (R. 5a).

The Motion to Quash Subpoena was not heard until August 24, 1953 (R. 26a). No order of the court after

the Motion to Quash the Subpoena was ever made, setting a time or place by order of the court to comply.

Rule 17(a) of the Rules of Criminal Procedure necessarily encompasses a hearing on the motion and an order made after the motion, giving the person who makes it an opportunity to comply. In *United States v. United Mine Workers, of America,* 330 U. S. 291, 91 L. Ed. 911, this Court quoted from *United States v. Shipp,* 203 U. S. 563, 51 L. ed. 319, where a question of the court's jurisdiction was involved to punish for contempt for violation of a stay order. This court said:

> "On that question, at least, it was its duty to permit argument and to take the time required for such consideration as it might need. See *Mansfield, C. & L. M. R. Co. v. Swam,* 111 U. S. 379, 387, 28 L. ed. 462."

So, here, upon a Motion to Quash under Rule 17(c), it was the trial court's duty to permit argument and to take time required for such consideration as it might need. And, until it had done so and made a subsequent order, there could be no contempt in any event.

See also

In re East Kodak Co., 7 F. R. D. 760;
Boyd v. U. S., 116 U. S. 616;
Hale v. Henkel, 201 U. S. 43;
In re United Shoe Manufacturing Co., 6 F. R. D. 347;
Bank of America v. Douglas, 105 Fed. (2) 100.

This raises an important question of procedural due process of which this petition was denied and upon which this court should pass.

VI.

THE PURPORTED SUBPOENA DUCES TECUM WAS VOID FOR WANT OF COMPLIANCE WITH RULE 17(d), WHICH PROVIDES:

> "A subpoena may be served by the marshal, by his deputy or by any other person who is not a party and who is not less than 18 years of age. Service of a subpoena shall be made by delivering a copy thereof to the person named and by tendering to him the fee for 1 day's attendance and the mileage allowed by law."

It was agreed that there was no tender to the defendant of his fee and the mileage allowed by law. That tender means an offer at the time of the service of the subpoena. There is no duty on the part of the person handed a subpoena to go to the marshal's office, or any place else, except to the court where he is required to appear. No tender existed in this case and the purported document was void as a subpoena without the tender required by Rule 17(d).

"Tender" is an offer of full performance at the proper time and place. The petitioner was not tendered anything at the time of the service of the subpoena, and therefore it was void.

VII.

THE PURPORTED SUBPOENA WAS ALSO VOID WITHOUT HAVING AN AFFIDAVIT IN SUPPORT OF IT, UPON OATH OR AFFIRMATION, AS REQUIRED BY THE FOURTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES, ANY RULE TO THE CONTRARY NOTWITHSTANDING. THE FOURTH AMENDMENT PROVIDES:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

A *subpoena duces tecum* to furnish evidence is a search and seizure within the meaning of the Fourth Amendment to the Constitution. Such a search and seizure under the Fourth Amendment requires "probable cause, supported by Oath or affirmation, particularly describing the papers to be searched" by the inquisition. Such oath does not interfere with the power of the courts to compel, through a *subpoena duces tecum,* the production upon a trial in court or before the Grand Jury of documentary evidence; but, it does require such an oath or affirmation, to be lawful process.

Thus, in California, the state law governing *subpoena duces tecums* provides, (Section 1985 C. C. P.):

"The process by which the attendance of a witness is required is the subpoena. It is a writ or order directed to a person and requiring his attendance at a particular time and place to testify as a witness. It may also require him to bring with him any books, documents, or other things under his control which he is bound by law to produce in evidence.

All applications before trial for *subpoenas duces tecum* shall be accompanied by an affidavit specifying the exact matters or things desired to be produced, and setting forth in full detail the materiality thereof to the issues involved in the case, and stating that the witness has the desired matters or things in his possession or under his control."

Section 1987.5 of the Code of Civil Procedure, provides:

"The service of a *subpoena duces tecum* is invalid unless at the time of such service a copy of the affidavit upon which the subpoena was issued is served on the person served with the subpoena."

While the federal statute regarding subpoenas does not contain this exact provision, it is implicit in the Fourth Amendment to the Constitution of the United States.

Boyd v. United States, 116 U. S. 616.

To compel the production of "books, papers and things" without an oath or affirmation specifically violates this amendment. To hold one in contempt for

the failure to produce, based upon an oath or affirmation, equally violates this Amendment.

Boyd v. United States, 116 U. S. 616.

This is an important question of criminal law and procedure which has not been, but should be, decided by this Honorable Court.

VIII.

THE TRIAL COURT ERRED IN HOLDING THE TRIAL BEFORE HIMSELF, AS THE EVIDENCE SHOWED HE HAD AN INTEREST IN THE OUTCOME OF THE CASE.

The case is on all four with *Re Murchison,* 99 L. Ed. (Adv.) 551, and *Re Oliver,* 333 U. S. 257.

This case arose in the same state as both *Re Murchison* and *Re Oliver.* The trial judge who had been in the United States Attorney's office on Motion to Reduce Bail, on argument on Motion to Quash the Subpoena, before hearing any evidence, denominated the Motion to Quash the *Subpoena Duces Tecums* as "insulting, contemptuous and scandalous and it is a trick as old as your client." (R. 28a). And he reads motives into the defendant's Motion to Quash the Subpoena without any evidence on which to base it. (R. 31, 32, 33a). And, it appears that the court had taken some information from reading newspapers which were not in evidence before him, (R. 34a, lines 12-13), and the court expressed himself, without taking any evi-

dence, that the motion was completely without merit. (R. 34a).

The government on its Answer to the Motion to Quash the Subpoena, filed no counter affidavit except that of A. E. French, a Post Office Inspector, as to the mode and manner of serving the subpoena (R. 14a). The affidavit of the appellant is not denied by any counter affidavit, or anything under oath, and this affidavit stands uncontradicted. Yet, the court expressed himself that the appellant's position was completely without merit. (R. 34a). Thereafter, the government said it would ask to prepare an order, if the court saw fit, that compliance be made in full with the original *subpoena duces tecum* in this cause to produce these books and records within one week (R. 35a). But, the court, in denying the motion to quash, suggested a presentment to the court, "and, if a Presentment of that description is made, then I will order the arrest of the defendant and ask that he be brought in the custody of the United States Marshal and a hearing set on why he shouldn't be cited for contempt of court." The court suggested, "the order of compliance or a Presentment from the grand jury, if the grand jury sees fit to make the Presentment; because I am convinced Mr. John Lloyd Taylor is going to try and conduct this matter in his own way and I don't think he should be permitted to do it."

The court fixed the bail at $10,000.00 (R. 38a), and denied any reduction (R. 38a), and conducted the cross examination of the petitioner, very largely, himself, and denied it September 23, 1953. (R. 113a).

There was no presentment by the grand jury, which would have entitled the defendant to a jury trial, but instead a Petition for Rule to Show Cause was brought before the judge. (R. 19a). The judge's interest in the proceedings was shown by his statement, on August 24, 1953, when he said:

> "I will deny your Motion to Quash. And, if the Government sees fit to present an Order asking for compliance, or if the Government and the grand jury sees fit to make a Presentment to the Court asking that the Witness, John Lloyd Taylor, be cited for contempt of court for not complying with the provisions of the *subpoena duces tecum,* I will entertain such a Presentment; and, if a Presentment of that description is made, then I will order the arrest of the defendant and ask that he be brought here in the custody of the United States Marshal and a hearing set on why he shouldn't be cited for contempt of court.
>
> So, whatever method the government wants to pursue is agreeable with the court; the order of compliance or a Presentment from the grand jury, if the grand jury sees fit to make the Presentment; because I am convinced Mr. John Lloyd Taylor is going to try and conduct this matter in his own way and I don't think he should be permitted to do it."

On September 17, 1953, the court said:

> "I'm firm in the conviction that Taylor took himself out of the country to avoid honoring the Grand Jury Subpoena. I'm sure that Taylor is not as naive as you would want me to think he is.

> He has a law school background and I have information that he prepared the petition in support of the motion to quash the subpoena which I held to be scandalous and contumacious." (R. 117a, R. 108a, R. 35a).

The judge showed that he had a definite interest in the case and that he did not hold the balance, nice, clear and true between the government and the accused, and therefore denied the latter due process of law. (*Tumey v. Ohio,* 273 U. S. 510, 532; *Re Murchison,* 99 L. Ed. (adv.) 554.)

In *Re Murchison,* supra, this court said:

> "A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision."

The court then said:

> "It would be very strange if our system of law permitted a judge to act as a grand jury and then try the very persons accused as a result of his investigations."

But that is what happened here. The government did not suggest—but the trial judge did suggest a Presentment. Apparently he had gathered information

from outside; he expressed an interest by his comments, and it was he who suggested bringing the defendant in on a contempt proceeding. Having initiated these proceedings, he largely conducted the questioning of the appellant with all the zeal of the prosecutor. "Fair trials are too important a part of our free society to let prosecuting judges be trial judges of the charges they prefer."

The judge in this case from his comments apparently got facts from the newspaper accounts and from some source not shown by the record. Instead of ordering the production of the books and records, which it appeared was the object of the inquiry, he was anxious to get the appellant brought before him by a United States Marshal; he fixed a high bail and refused to reduce it; then he held the hearing before himself. He failed to consider the uncontradicted affidavit of the defendant and assumed, without seeing him or discussing the matter, that some of the matters expressed in it were not true, and imputed a purpose to the defendant at this hearing not shown by any evidence nor upon any basis which was reasonable. He took no evidence on the onerous nature of the subpoena nor its possible violation of the Fourth and Fifth Amendments to the Constitution of the United States. Without giving the petitioner a chance to comply by the production of the books, papers and records, he ordered him found guilty of contempt and sentenced him to five months in the penitentiary.

The petitioner was entitled to a full and fair hearing on the sufficiency of the *subpoena duces tecum* on whether it exceeds the bounds set forth by the Fourth Amendment against unreasonable searches and seizures; as to whether the inquiries outside the scope of the authority delegated to the grand jury and several other questions.

Interstate Commerce Commission v. Brimstone, 154 U. S. 479, 489, 88 L. Ed. 1058, 1061;
Harriman v. Interstate Commerce Comm., 211 U. S. 407, 53 L. Ed. 253;
Ellis v. Interstate Commerce Comm., 237 U. S. 434, 59 L. Ed. 1036;
Smith v. Interstate Commerce Comm., 245 U. S. 33, 62 L. Ed. 135;
Federal Trade Commission v. American Tobacco Co., 264 U. S. 298, 68 L. Ed. 696;
Oklahoma Press Publishing Co. v. Walling, 327 U. S. 186, 90 L. Ed. 614, and
Re Murchison, 99 L. Ed. (adv.) 551.

IX.

THE DEFENDANT WAS ENTITLED TO A TRIAL BY JURY ON THE QUESTIONS OF FACT RAISED IN THE CRIMINAL PROSECUTION UNDER THE SIXTH AND SEVENTH AMENDMENTS TO THE FEDERAL CONSTITUTION.

The question raised by this petition is whether in a criminal contempt proceeding which did not occur in the presence of the judge, the defendant is entitled to a trial by jury. In this case nothing was raised or discussed by the court which set the matter before itself without a jury trial; there was no waiver of the right to trial by jury.

Amendment Six of the Federal Constitution provides:

> "In all criminal prosecution, the accused shall enjoy the right to a speedy and public trial by an impartial jury."

A criminal contempt is a criminal prosecution, and this was a criminal prosecution.

The Seventh Amendment provides:

> "In suits at common law where the valuein controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law."
> (Amendment VII, Federal Constitution.)

We respectfully submit that it was error to try the case without a jury since there was no express waiver, and that this was a criminal prosecution. Neither Congress nor Rules, if construed otherwise, could abolish the express provisions of the Constitution which we think are applicable here. (See, *United States v. United* footnotes therein.) And, see, *Lillenthial* "The Power to Compel Testimony", 39 Harv. L. Rev. 694; *Penfield v. Securities & Exchange Comm.*, 330 U. S. 585, 91 L. Ed. 1117; *U. S. v. Curtiss Wright Export Corp.*, 299 U. S. 304, 81 L. Ed. 255; *Langnes v. Green*, 282 U. S. 535, 75 L. Ed. 520.

Here, although the purpose of the government was claimed to be to get the document, books and records in the possession of the petitioner, when the petitioner arrived, the judge abandoned all that purpose and gave him five months in the penitentiary instead, on a hearing before him. The trial judge was not interested in hearing any testimony as to reasonable specification. (See: *Hale v. Henkel*, 201 U. S. 92; *Essgee Company v. United States*, 262 U. S. 151; *In re Eastman Kodak Co.*, 7 F. R. D. 760; *In re United Glass Co.*, 7 F. R. D. 759; *Inre Fred W. Means Heel Co.*, 7 F. R. D. 759.)

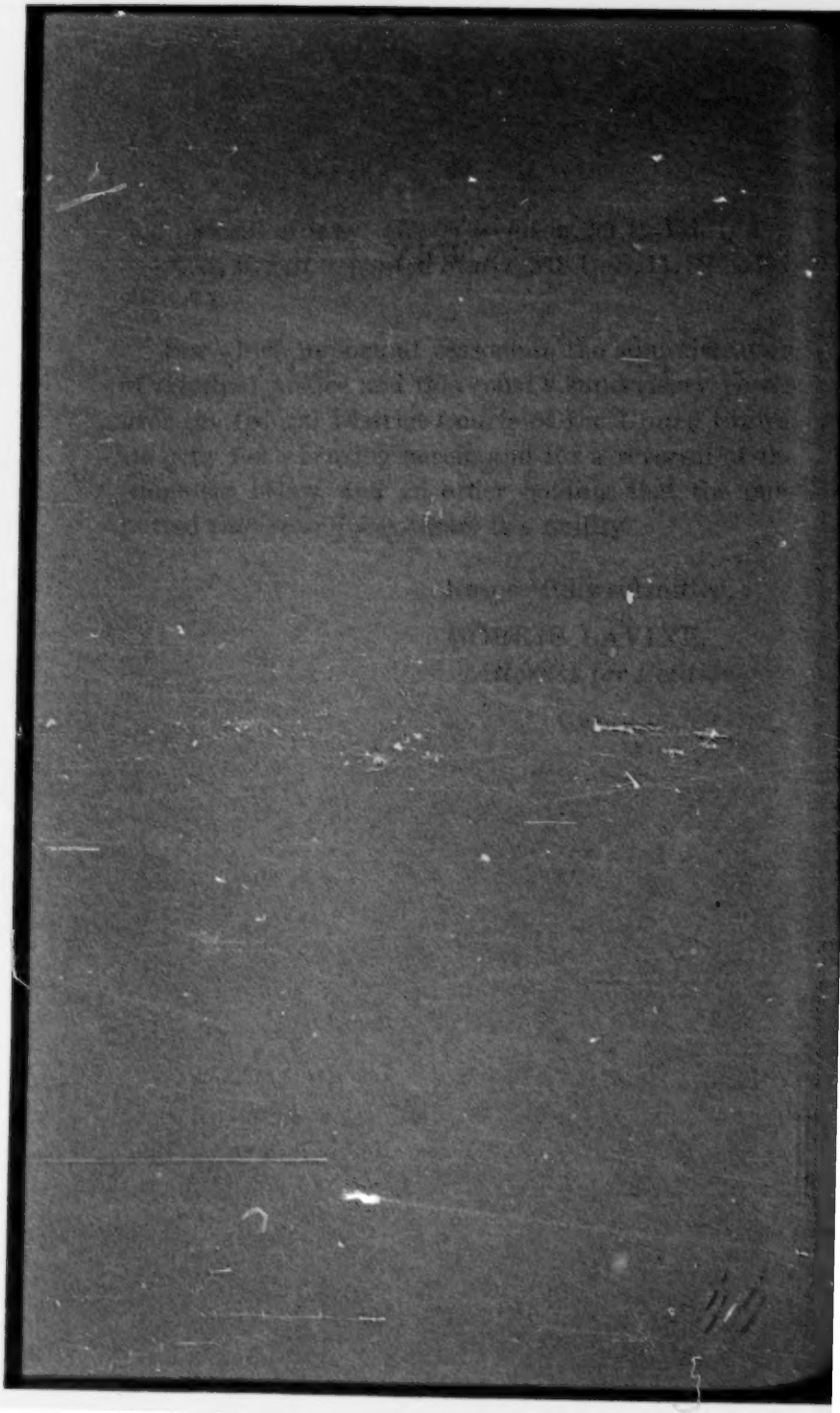
It will be seen that "Thus, the judge, whom due process requires to be impartial in weighing the evidence presented before him, called on his own personal knowledge" etc. . . . "and his judgment was based in part on this impression, the accuracy of which could not be tested by adequate cross-examination." This judge, showing himself to be interested in the proceedings, was disqualified and denied the petitioner

due process of law. (*Re Murchison,* 99 L. Ed. (adv.) 554, 555; *Offutt v. United States,* 348 U. S. 11, 99 L. Ed. Adv. 7).

For which important reasons in the administration of criminal justice and this court's supervisory power over the federal District Courts of the United States, we pray for a hearing herein and for a reversal of the judgment below, and an order holding that the purported *subpoena duces tecum* is a nullity.

Respectfully submitted,

MORRIS LAVINE,
Attorney for Petitioner.



APPENDIX

[TITLE OF COURT AND CAUSE.]

CAUSE ARGUED AND SUBMITTED

April 14, 1955—Before: Simons, Chief Judge.

Allen and Miller, Circuit Judges.

This cause is argued by John A. Baxter for appellant and by George E. Woods for appellee and is submitted to the court.

[TITLE OF COURT AND CAUSE.]

JUDGMENT

Filed May 3, 1955

Appeal from the District Court of the United States for the Eastern District of Michigan.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Michigan, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

[TITLE OF COURT AND CAUSE.]

OPINION

Filed May 3, 1955

FILED May 3—1955

CARL W. REUSS, Clerk

No. 12331

UNITED STATES COURT OF APPEALS
For the Sixth Circuit

JOHN LLOYD TAYLOR,)
Appellant,)
vs.)
UNITED STATES OF AMERICA,)
Appellee.)

Appeal from the District Court of the United States for the Eastern District of Michigan, Southern Division.

Decided May 3, 1955.

Before SIMONS, Chief Judge; ALLEN and MILLER, Circuit Judges.

PER CURIAM. The District Judge found the appellant, John Lloyd Taylor, guilty of contempt of court and sentenced him to imprisonment for a period of five months, from which judgment this appeal was taken.

On August 6, 1953, a subpoena was issued out of the U. S. District Court for the Eastern District of Michigan directed to the appellant in Los Angeles, California, which commanded him to appear in U. S. District Court for the Eastern District of Michigan in Detroit, Michigan, at 10:00 a.m. on August 13, 1953 to testify before the Grand Jury and to bring with him all the records and books covering the operation of the Detroit Michigan Office of the Professional Screen Guild. Service on the appellant was effected on August 11, 1953 at which time he was offered advance travel funds. Appellant was granted an extension to August 18, 1953 in which to appear. Although appellant advised the U. S. Marshal's office that he would call for his transportation expenses, he did not do so.

On August 18, 1953, a few minutes before 10:00 a.m., appellant's counsel filed in the District Court at Detroit a motion to quash the subpoena, supported by the appellant's affidavit. Appellant did not appear in person. On August 21, 1953, the United States filed its answer to the motion. Following a hearing on August 24, 1953, the motion was denied. On August 25, 1953, the United States filed a petition charging appellant with criminal contempt, supported by affidavits setting out the services of the subpoena, the offer of transportation costs, and the failure of the appellant to comply with the subpoena from August 18, 1953 to August 25, 1953. A warrant of arrest was issued, but was not executed because appellant could not be found. Appellant appeared with counsel on September 16, 1953 and

was placed under a $10,000 bond. Hearing on the contempt was held on September 25, 1953.

The evidence at the hearing developed the fact that appellant was in Mexico from August 22, to September 7, 1953, ostensibly for a vacation; that he registered at a motel in Mexico under a different name and could not be located or communicated with; that his wife was unable to give his address; that no attempt was made by the appellant from August 22, 1953 to September 7, 1953 to ascertain the outcome of the hearing on his motion to quash; and that it took him an additional nine days from September 7, when he first knew of the Court's order denying his motion to quash, to present himself before the U. S. District Court in Detroit. Judgment of contempt followed.

It is well settled that disobedience of a *subpoena duces tecum* is punishable as contempt of court. *Wilson v. United States,* 221 U. S. 361, 376-377; Rule 17(c) and (g), Rules of Criminal Procedure. Reliance upon advice of counsel that it need not be obeyed or belief on the part of the person subpoenaed that it is invalid does not excuse disobedience. *Eustace v. Lynch,* 80 F. (2d) 652, 656, C. A. 9th; *United States v. Goldfarb,* 167 F. (2d) 735, C. A. 2nd. Compare *Land v. Dollar,* 190 F. (2d) 366, 379, C. A. D. C., cert. dismissed, 344 U. S. 806.

Appellant contends, however, that his motion to quash, filed prior to the designated time for his appearance and not passed on until after the designated time, excused his failure to appear at the designated time, and that he had not been notified to appear at any

specific time thereafter. Counsel stresses the point that appellant could not be deprived of his legal right to file a motion to quash or be punished for contempt in his exercise of such right. The contention does not meet the present issue. Rule 17(c), Rules of Criminal Procedure authorizes the filing of a motion to quash However, it will be noticed that the rule also requires that such a motion be "made promptly." Although not complying with the rule, appellant was not however deprived of that right. His conduct thereafter is what concerns the Court.

Certainly, the motion to quash did not kill the subpoena. It merely held it in abeyance until the motion was disposed of. Upon denial of the motion, the command of the subpoena was in full force and effect. There was no need to designation another date for compliance. Time of compliance was already past due, and except for the pendency of the motion appellant was already in default. No doubt a reasonable opportunity would be afforded appellant to be advised of the ruling and to promptly comply before being cited for contempt. But appellant's conduct in leaving the country before the motion was ruled upon, in making himself unavailable for more than two weeks to communications of any kind, and in arbitrarily further delaying compliance for approximately nine days after his return to the United States and notice of the ruling was clearly contumaceous and fully justified the judgment of contempt. *United States v. Goldfarb,* supra, 167 F. (2d) 735, C. A. 2nd.

The judgment is affirmed.

[TITLE OF COURT AND CAUSE.]

ORDER AMENDING OPINION AND DENYING REHEARING

Filed May 31, 1955

Appellant's petition for rehearing, having been considered by the Court;

IT IS ORDERED that the words in the *Per Curiam* of May 3, 1955 "he registered at a motel in Mexico under a different name" be changed to read: "he stayed at a motel or cabin in a mountainous area outside of a city where he was not required to and did not register, and which had no mailing address or telephone connection";

And said petition for rehearing in all other respects is denied.

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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 193

JOHN LLOYD TAYLOR, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. 2a; R. 122) is reported at 221 F. 2d 809.

JURISDICTION

The judgment of the Court of Appeals (Pet. 1a; R. 121) was rendered on May 3, 1955, and a petition for rehearing was denied on May 31, 1955 (R. 129). The petition for a writ of certiorari was filed on June 29, 1955. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a subpoena duces tecum to appear before a grand jury issued by the court clerk under the seal of the court is invalid because not bearing the signature of a judge.

2. Whether the filing of a motion to quash a subpoena duces tecum operated to insulate petitioner against liability for contempt in failing to appear in answer to the subpoena where petitioner went to an inaccessible part of a foreign country before his motion to quash was heard, and remained there for some time beyond the return date of the motion.

3. Whether petitioner was offered a witness fee and mileage as required by Rule 17(d), F. R. Crim. P.

4. Whether petitioner was entitled to a jury trial on a charge of contempt.

5. Whether the judge who presided at the contempt hearing was disqualified to do so because of his remarks at the hearing on the motion to quash the subpoena.

STATUTES AND RULES INVOLVED

18 U.S.C. 401 provides:

> A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—
>
> (1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;

(2) Misbehavior of any of its officers in their official transactions;

(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

Rule 17, F.R. Crim P. provides in pertinent part:

Subpoena

(a) For Attendance of Witnesses; Form; Issuance. A subpoena shall be issued by the clerk under the seal of the court. It shall state the name of the court and the title, if any, of the proceeding, and shall command each person to whom it is directed to attend and give testimony at the time and place specified therein. The clerk shall issue a subpoena, signed and sealed but otherwise in blank to a party requesting it, who shall fill in the blanks before it is served. A subpoena shall be issued by a commissioner in a proceeding before him, but it need not be under the seal of the court.

* * * * *

(c) For Production of Documentary Evidence and of Objects. A subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated therein. The court on motion made promptly may quash or modify the subpoena if compliance would be

unreasonable or oppressive. The court may direct that books, papers, documents or objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit the books, papers, documents or objects or portions thereof to be inspected by the parties and their attorneys.

(d) Service. A subpoena may be served by the marshal, by his deputy or by any other person who is not a party and who is not less than 18 years of age. Service of a subpoena shall be made by delivering a copy thereof to the person named and by tendering to him the fee for 1 day's attendance and the mileage allowed by law.

* * * * *

(g) Contempt. Failure by any person without adequate excuse to obey a subpoena served upon him may be deemed a contempt of the court from which the subpoena issued or of the court for the district in which it issued if it was issued by a commissioner.

Rule 42(b), F. R. Crim. P. provides in pertinent part:

Criminal Contempt

* * * * *

(b) Disposition Upon Notice and Hearing. A criminal contempt except as provided in

subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. He is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment.

STATEMENT

Petitioner was convicted in the United States District Court for the Eastern District of Michigan of criminal contempt, in violation of 18 U.S.C. 401, for his failure to honor a subpoena duces tecum of a grand jury of that court (R. 107). He was sentenced to five months' imprisonment (R. 112). On appeal the conviction was affirmed *per curiam* (R. 122).

The facts pertinent to the issues raised may be summarized as follows:

The subpoena duces tecum dated August 6, 1953, addressed to petitioner as President of Professional Screen Guild, Inc., of Los Angeles, California, ordered him to appear on August 13, 1953 at 10 o'clock to testify before the grand jury and to bring all records and books covering operation of the Detroit, Michigan office of the Guild, plus membership records of six named individuals (R. 2, 3). A United States marshal served petitioner with this subpoena on August 11th at Los Angeles (R. 51, 53). Petitioner acknowledged that he had charge of the records requested (R. 53). At his request the postal inspector, who had accompanied the marshal to identify petitioner, telephoned Detroit and received authorization to extend the date of the subpoena to August 18th, at which date petitioner said he would be ready to appear with the records (R. 15, 16, 53, 54). He was told that advance payment of his travel expenses and fees would be paid him at the marshal's office in Los Angeles and he stated that he would come by and pick up the money (R. 16, 54).

Eight minutes before he was due to report to the grand jury, petitioner by counsel filed in the district court a motion to quash the subpoena (R. 4). The motion stated that the subpoena was unreasonable and oppressive in giving him only "two" days for compliance (R. 5); that petitioner had been refused advance payment of fees

and mileage (R. 4); and that his life would be endangered if he came to Detroit (R. 5). An attached affidavit signed by petitioner stated that the subpoena was a fishing expedition, that it did not inform him who was being investigated by the grand jury and did not say whether he himself was under investigation (R. 7, 8). Petitioner averred that he feared for his life if he came to Detroit; that when last in Detroit, he was constantly followed by thugs who he was informed and believed were in the employ of the Better Business Bureau of that city; that his friends had informed him that a threat had been made upon his life "when he appears before the Grand Jury on a subpoena now being prepared" (R. 9). He alleged that "the United States authorities * * * are unwittingly permitting themselves to be used as agents and servants of the Detroit Better Business Bureau in a plot to blackmail the Professional Screen Guild, Inc., and force it to pay an exorbitant membership fee in the Better Business Bureau of Detroit" (R. 10). At the hearing on the motion to quash, the trial court found that the motion and affidavit were insulting, contemptuous and scandalous (R. 28), that it was a studied attempt to influence the conduct of the grand jury (R. 29), that petitioner, "knowing that this case of this Professional Screen Guild has been given some publicity in Detroit, * * * was apparently hoping * * * that the contents of the affidavit would be published in the newspapers, and that the members of the grand jury would read it and,

after reading * * * the alleged charges he makes here, that their conduct and judgment would be influenced" (R. 31).

The court denied the motion stating (R. 35):

> I will deny your Motion to Quash. And, if the Government sees fit to present an Order asking for compliance, or if the Government and the grand jury sees fit to make a Presentment to the Court asking that the Witness, * * * be cited for contempt of court for not complying with the provisions of the *subpoena duces tecum,* I will entertain such a Presentment; and if a Presentment of that description is made, then I will order the arrest of the defendant and ask that he be brought here in the custody of the United States Marshal and a hearing set on why he shouldn't be cited for contempt of court.
>
> So, whatever method of the government wants to pursue is agreeable with the court; the order of compliance or a Presentment from the grand jury, if the grand jury sees fit to make the Presentment; because I am convinced Mr. John Lloyd Taylor is going to try and conduct this matter in his own way and I don't think he should be permitted to do it.

On August 25th, the day following the hearing on the motion, the government filed its petition for rule to show cause why petitioner, Taylor, should not be punished for contempt (R. 19).

At the contempt hearing, petitioner testified that

on August 22, 1953, two days before the hearing on the motion to quash (R. 26), he went on a fishing trip to Mexico (R. 68, 72), to a place where there was no mailing address, no telephone, and which was so remote that his wife did not know where he was (R. 88). He said that she had driven him down there, spent a short time with him in a nearby small city and then gone back, with instructions from him to pick him up again after Labor Day (R. 88, 89). It was on that day, he said, that he first learned of the decision on the motion, at which time he learned also that there was a warrant outstanding for his arrest on a charge of criminal contempt (R. 68). He said that he left Los Angeles on Labor Day and arrived in Detroit six days later to surrender on the warrant (R. 70), having stopped in Chicago and South Bend en route (R. 92).

At the conclusion of the hearing, the court found that the subpoena had been legally served on petitioner; that an adjournment of his appearance before the grand jury was authorized by the United States Attorney's office at petitioner's request (R. 104); that petitioner informed the post office inspector and the United States marshal that he would honor the subpoena and would call at the marshal's office to receive money for his expenses as a witness; that he never appeared and had no intention of appearing (R. 105). The court further found that the motion to quash was not filed in good faith, but was a device to assist petitioner in disobeying the lawful process of the court, that

the affidavit in support of petitioner's motion was contumacious and was submitted in an effort to influence the conduct of the grand jury in relation to an investigation at that time underway (R. 106). The court also found that petitioner concealed himself in a foreign country, Mexico, prior to the time of the hearing on the motion to quash the subpoena, and remained concealed until September 7, 1953; that the act of concealment was a further act on his part to avoid appearing in Detroit as a grand jury witness (R. 106).

ARGUMENT

1. There is no substance in petitioner's contentions (Pet. 21-28) that the subpoena was invalid because it was issued on behalf of a grand jury and did not bear the signature of a judge of the district court. The grand jury is an arm of the district court. Rule 17(a) requires that the subpoena shall be issued by the clerk under the seal of the court, as was done here, and subdivision (g) provides that failure without excuse to obey the subpoena is a contempt of the court which issued it.[1] A similar contention was expressly overruled in *In re Subpoenas Duces Tecum,* 248 Fed. 137 (E. D. Tenn.). As noted in that opinion the contention

[1] The rule is itself adequate notice that disobedience to a subpoena is punishable as a contempt (see Pet. 29). There is no requirement that federal subpoenas, issued in conformity with the federal rules, conform to state procedure (see Pet. 34-36). While an unreasonable subpoena may amount to an illegal search and seizure, that is an issue to be determined on a motion to quash. The mere issuance of the subpoena is not a search.

was overruled by implication in *Wilson* v. *United States,* 221 U.S. 361, 370, 376, where the president of a company responding to a subpoena duces tecum refused to allow the grand jury to inspect the documents which he had brought with him, and on being charged with contempt, challenged the sufficiency of the subpoena because not issued pursuant to an order of court. The Court, after reviewing the several objections to the sufficiency of the subpoena but without again referring to this specific objection, said that "no ground appears upon which the corporation could have resisted the writ;" and again, "* * * that the subpoena was valid and * * * imposed upon the corporation the duty of obedience."

2. Petitioner contends (Pet. 30-33) that the filing of his motion to quash operated automatically to stay his obligation of reporting to the grand jury on the 18th, and that he was under no obligation to do so until a new date was set and an order entered for him to appear and testify. Even conceding that the motion would stay the obligation of reporting until it was heard, the fact remains that before the return date on the motion petitioner deliberately left the country and placed himself in a position where the decision of the court on the motion and its orders or legal process could not reach him until a considerable time after the ruling. Manifestly, petitioner could not undertake for himself to decide when the subpoena

should be made returnable if his motion should be overruled.

3. Petitioner's contention (Pet. 33) that a physical tender of the mileage money and attendance fee had to be made at the time of service of the subpoena is without merit. There was ample testimony that he agreed to come to the marshal's office and collect the money. Inspector French so stated in his affidavit (R. 16, 17); Richard Ransdell, the marshal who served the subpoena, so testified in person (R. 54) and by affidavit (R. 22). Another marshal stated in an affidavit that he called Taylor to advise that his money was waiting for him and it was arranged that Taylor would pick it up on the 12th; that Taylor then called back and said that he would pick up the money on the 13th instead, since a postponement of his appearance to the 18th had been granted (R. 23).

Certainly, if the rule were construed to require a physical tender at the time of service of the subpoena, petitioner effectively waived the requirement.

4. Petitioner had no right to a trial by jury. He was charged, under 18 U.S.C. 401, with contempt by disobedience or resistance to the district court's lawful writ of process. Rule 42(b), F. R. Crim. P., provides for disposition upon notice and hearing, and he received both. It also provides that the defendant is entitled to a trial by jury in any case in which an act of Congress so provides. The sentence refers to 18 U.S.C. 402 and 18 U.S.C.

3691,[2] which provide for trial by jury in certain cases wherein the contempt consists of an act constituting a separate criminal offense under statutes of the United States. Both sections specifically exclude from the provision for jury trial contempts, such as petitioner's, "committed in disobedience of any lawful writ, process, order, rule, decree, or command entered in any suit or action brought * * * in the name of * * * the United States."

The rule and statutory provisions are of course in harmony with the traditional method of trial of contempt cases without juries. *Ex parte Terry,* 128 U.S. 289. Moreover, petitioner made no demand for a jury and should be deemed to have waived the privilege, even if he were otherwise entitled to it.[3]

5. The trial court's statement, at the conclusion of the hearing on the motion to quash, that an order for compliance with the subpoena would be granted, or that a presentment for contempt would be entertained, furnishes no valid basis for petitioner's claim of bias or "interest." It was a permissible comment, in accord with his holding that petitioner's affidavit was contemptuous and insulting. Reflecting only the court's holding, it comes within the rule that the bias or prejudice which

---

[2] See Notes of Advisory Committee on Rules, following Rule 42(b).

[3] 18 U.S.C. 3691 which petitioner erroneously contends applies to him provides that the accused can have a jury "upon demand therefor."

can be urged against a judge must be based upon something other than rulings in the case. *Refior* v. *Lansing Drop Forge Co.*, 124 F. 2d 440, 444, 445 (C.A. 6), certiorari denied, 316 U.S. 671. See *Berger* v. *United States*, 255 U.S. 22, 31; *Ex parte American Steel Barrel Co.*, 230 U.S. 35. The finding of contempt is based on ample evidence of petitioner's deliberate failure to obey the subpoena.

CONCLUSION

The substantial issues, which are factual, were decided correctly by the court below, and further review is not warranted. It is respectfully submitted that the petition for a writ of certiorari should be denied.

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BEATRICE ROSENBERG,
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Attorneys.

AUGUST, 1955.

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FILED
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HAROLD B. WILLEY,

No. 193

IN THE

SUPREME COURT

OF THE

United States

October Term 1955

JOHN LLOYD TAYLOR,
Defendant-Appellant,
vs.
UNITED STATES OF AMERICA,
Plaintiff-Appellee.

PETITION FOR REHEARING

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IN THE

SUPREME COURT

OF THE

United States

October Term 1955

JOHN LLOYD TAYLOR,
Defendant-Appellant,
vs.
UNITED STATES OF AMERICA,
Plaintiff-Appellee.

No. 193

PETITION FOR REHEARING

To The Honorable Chief Justice, Earl Warren, and to the Honorable Associate Justices of the Supreme Court of the United States:

COMES NOW JOHN LLOYD TAYLOR and respectfully petitions this Honorable Court for rehearing on the following grounds, to-wit:

An important new point has been discovered in the re-analysis of the case which ought to be considered and passed on by this Honorable Court; namely,

WHETHER A SUBPOENA TO APPEAR BEFORE A FEDERAL GRAND JURY COMES UNDER THE RULES OF CIVIL PROCEDURE FOR THE DISTRICT COURTS OF THE UNITED STATES WHERE THE PERSON SUBPOENAED IS MERELY A WITNESS AND IS NOT CHARGED WITH ANY CRIME AND THE SUBPOENA IS SERVED AT A DISTANCE OF MORE THAN 100 MILES FROM THE RESIDENCE OF THE PERSON SUBPOENAED.

HAS A DISTRICT COURT THE JURISDICTION AND POWER TO COMPEL A WITNESS TO TRAVEL 2600 MILES WITH BOOKS AND RECORDS AND PUNISH HIM FOR CONTEMPT FOR FAILURE TO DO SO?

THE FACTS

The factual basis for rehearing is this: On August 6th, 1953, the Clerk of the District Court at Detroit, Michigan, in the Eastern District of Michigan, issued a subpoena to John Lloyd Taylor, at 6605 Hollywood Boulevard, Los Angeles, California, a distance of 2600 miles and *outside* the judicial district of the Eastern District of Michigan, and more than 100 miles away from that district, to produce all books and records covering the operation of the Detroit, Michigan office of the Professional Screen Guild, and all the names and addresses of all the officers and employees with salaries paid, and all records of the Professional Screen Guild, showing membership in that organization by Bing Crosby, Bob Hope, Roddy McDowell, Elizabeth

Taylor, Dean Stockwell and Margaret O'Brien. The document did not purport to state that those records were in the *judicial district* of the *Eastern* District of Michigan nor that the witness was in that district or resided in that district. The document was *served* on Mr. Taylor in Los Angeles, California on August 11th, 1953, where he has his residence and principal place of business minus an actual immediate tender of travel expense. The subpoena called for his appearance on August 13th—two days later—at Detroit, Michigan, but by a series of phone calls it was purportedly extended to August 18th, 1953. The subpoena called for Mr. Taylor (2600 miles away) to appear before the Federal Grand Jury at Detroit, Michigan, in the Eastern District of Michigan. For his failure to appear in the designated day in person extended by telephone he was adjudged in contempt and given five months in jail, and required to post a bail bond of $10,000 on appeal.

The questions involved in this case,, in addition to those urged on the original petition is whether the District Court of the Eastern District of Detroit had jurisdiction to issue a subpoena for a *witness* 2600 miles away, and not in that judicial district and whether it had jurisdiction to adjudicate him in contempt for failure to appear at the designated time, 2600 miles away from his home and whether such a subpoena to appear merely as a *witness* and to produce books and records to a point (2600 miles away) is pursuant to any statutory authority or rule of court, and is not contrary to the constitution, giving jurisdiction to district courts only within their own judicial districts.

The petitioner urges, upon this Court, that a *witness* to appear before a Grand Jury and to produce books and records before that body is a *civil* subpoena governed by the Rules of Civil Procedure for the District Courts of the United States.[1] Certainly the *witness* is himself not charged with any crime, nor does any statute or other rule fix the authority for the issuance of a subpoena and the compulsion to appear at a distance 2600 miles away. The mere issuance of a subpoena to appear before that body is no indication that a crime will even be charged. In this case no one has ever been charged with a crime.

The statute or rule governing witnesses in civil proceedings is Rule 45, Rules of Civil Procedure for the District Courts of the United States which provides as follows:

(a to e . . .)

(e) Subpoena for a Hearing or Trial.

(1) At the request of any party subpoenas for attendance at a hearing or trial shall be issued by the clerk of the district court for the district in which the hearing or trial is held. A subpoena requiring the attendance of a *witness* at a hearing or trial may be served at any place *within the district,* or at any place *without* the district that is within 100 miles of the place of the hearing or trial specified in the subpoena; and, when a statute of the United States provides therefor, the court upon

[1]A grand jury proceeding is not a criminal prosecution and a witness therein is not a party defendant. *In re Lemon* 15 C.A. (2) 82; 59 P. (2) 213. See also *U. S. v. Price* 163 Fed. 904; *Post v. U. S.* 161 U. S. 583; *U. S. v. Kimball* 117 Fed. 156.

proper application and cause shown may authorize the service of a subpoena at any other place. (Emphasis ours).

(2) A subpoena directed to a witness in a foreign country shall issue under the circumstances and in the manner and be served as provided in Title 28, U. S. C. § 1783. As amended Dec. 29, 1948, eff. Oct. 20, 1949."

The subpoena in question was issued by the clerk of the court, and no statute of the United States authorizes any district court to issue the subpoena or gives the district courts of one district to subpoena a witness 2600 miles away. The trial court's demands exceeded lawful limits. Mr. Taylor was under no duty to travel 2600 miles in answer to a civil subpoena to appear as a witness. That appearance, we respectfully submit, is governed by Rule 45(e), of the Rules of Civil Procedure for the District Courts of the United States, and since it was served more than 100 miles away, we submit that the District Court of the Eastern District was without jurisdiction in the matter and the subpoena was a nullity and the judgment of contempt was void.[2] *West Publishing Co. v. Edward Thompson Co.,* 151 F. 138; *The Patapsco Ins. Co. v. South Gate,* 5 Pet. (30 U. S.) 604; 8 L. Ed. 243; *U. S. v. Stern,* 177 Fed. 479. The convenience of witnesses

[2]Our famous forefathers, in getting up the Declaration of Independence complained of the King of England that "he has combined with others to subject us to a jurisdiction foreign to our constitution and unacknowledged by our laws; and they further complained of him . . . for transposing us beyond seas to be tried for pretended offenses." Our Tax Court judges travel to the locale of their hearings as do Commissioners of the Court of Claims.

as a matter of solicitude. *Tomlinson v. Moon,* 189 Fed. 845.

The right to subpoena witnesses is purely statutory. Prior to the revised present Title 28, Section 655, Title 28 (R. S. 877); Mar. 3, 1911, C. 231, Sec. 291, 36 Stat. 1167, provided:

> "Witnesses who are required to attend any term of a district court on the part of the United States, shall be subpoenaed to attend to testify generally on their behalf, and not to depart the court without leave thereof, or of the district attorney; and under such process they shall appear before the grand or petit jury, or both, as they may be required by the court or district attorney,"

The revised Title 28 omitted any provisions or statutory directions regarding grand juries.

The mode of summoning witnesses in the federal courts is regulated by statute.

Texas P. & R. Co. v. Nelson, 50 Fed. 814.

Many departments have their own statutory provisions for subpoenaes—The Securities and Exchange Commission (Sec. 19b of the Securities Act) (May 27, 1933) 48 Stat. 74; 15 U. S. C. A. 775(a) The Fair Labor Standards Act (June 25, 1938) 52 Stat. 1060 C. 676, 29 U. S. C. A., Sec. 211, in corporating Sec. 9 of the Federal Trade Commission Act, 38 Stat. 717 C. 811. See also Section 10 of that Act imposing criminal penalties for refusal to testify or to produce documents, etc. The Internal Revenue Code, Sec. 7402(b),

the Postoffice Department and many other statutes affecting investigative agencies have specific statutory authority and provide punishments for disobedience or may even contain immunity provisions for compliance. See Compulsory Testimony Act of Feb. 11, 1893, 49 U. S. C. A. 46; also 202(g) of the Emergency Price Control Act of 1942; 50 U. S. C. A. Appendix, Sec. 922(g).

This point we urge most strongly upon this court in addition to the point that the subpoena was not "served" in a true sense when no tender of travel expense was made simultaneously with the subpoena.

We think that this issue is of sufficient importance in the administration of justice to require a full and fair hearing on the merits, in addition to other points raised on our Petition for Certiorari originally, which we re-urge here with the same force and effect as if set out in this Petition for Rehearing.

WHEREFORE, petitioner respectfully prays that this Honorable Court grant a Rehearing and reverse the judgment and order before for want of jurisdiction of the Eastern District of Michigan.

Respectfully submitted,

MORRIS LAVINE
Attorney for Defendant-Appellant.

CERTIFICATE OF COUNSEL

I, Morris Lavine, attorney for the petitioner, do hereby certify that the foregoing petition is filed in good faith and not for the purposes of delay, and that it raises new matters of importance not heretofore urged upon the court in the original petition, and which should be considered in connection with the case before it is finally concluded. The grounds here urged are substantial and were not previously presented, and this petition is restricted to the grounds specified.

MORRIS LAVINE